Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO (Kiewit Pacific Co.) *and* Cynthia Albert. Cases 37–CB–1253 and 37–CB–1262

July 24, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 20, 1997, Administrative Law Judge Michael D. Stevenson issued the attached bench decision. The Respondent filed exceptions, a supporting brief, and an answering brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked 'Appendix B.'[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

2. Substitute the following for paragraph 2(c).

''(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.''

Jill M. Hawken, Esq., for the General Counsel.
Lawrence B. Miller, Esq., of Alameda, California, for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was heard in Honolulu, Hawaii, on February 27, 1997. The central issue in the case concerned whether Respondent Union failed to permit Charging Party Cynthia Albert access to and the opportunity to examine and photocopy hiring hall records for those classifications in which Albert was registered. At the conclusion of the case, I rendered a bench decision in favor of the General Counsel, finding that she had established a violation of Section 8(b)(1)(A) of the Act as alleged.[1]

The bench decision was rendered pursuant to the General Counsel's request, over Respondent's objection, and pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach as ''Appendix A,'' the pertinent portions of the trial transcript (pp. 91–96 and 110–118).

In conclusion, I note that Respondent admitted that Kiewit Pacific Co. is an employer with a place of business in Kapolei, Hawaii, where it engages in the construction business and that the Employer is, for all times material to the case, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admitted that, for all times material to the case, it is a labor organization within the meaning of Section 2(5) of the Act, and that it operates an exclusive hiring hall. There is no issue regarding Albert's status as a bona fide registrant at Respondent's hiring hall.

CONCLUSION OF LAW

Based on the record, I find that Respondent violated the Act as alleged in the amended complaint, that Respondent's defenses: (1) that the information sought by Albert could be used for purposes other than those asserted by Albert; (2) that the information would be ineffective to achieve Albert's asserted goals; and (3) that production of the information sought would be unduly burdensome, are defenses lacking in

[1] We agree with the judge that the Respondent has failed to show any legitimate interest in denying the Charging Party's request for photocopies of the Respondent's out-of-work lists. Further, although the Respondent now claims that there are alternative documents or means by which Albert's concerns about referrals could be answered, the record does not show that the Respondent proposed to her at the time she made the request any alternative documents or means by which she could independently confirm or allay her concerns.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

In its exceptions, the Respondent contends, inter alia, that the judge's remedy is unduly burdensome insofar as it requires the Respondent to furnish the Charging Party with photocopies of the out-of-work lists retroactive to the date she first requested them. The record, however, contains no evidence on this issue, and we therefore leave its resolution to the compliance stage.

[1] Inadvertently, I announced my decision before affording Respondent an opportunity to render its closing argument. Belatedly, I allowed Respondent and the General Counsel a full opportunity to make closing arguments, which I note focused primarily on the appropriate remedy. Thereafter, I reaffirmed my finding that the General Counsel had established a violation of the Act and took under submission what would constitute an appropriate remedy. The remedy and my rationale will follow below.

merit in the context of this case and they are rejected. The violations found here affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that Respondent be ordered to honor the Charging Party's request for photocopies of referral records.

On these conclusions of law, and on the entire record, I issue the following recommended

ORDER

The Respondent, Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily denying requests for photocopies of referral records from employees who are registered for referral in certain classifications from its exclusive hiring hall and who reasonably believe they have been improperly denied referrals.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor Cynthia Albert's prospective request for photocopies of referral records in relevant classifications on payment of reasonable costs for those photocopies or, alternatively, allow her to photocopy those records, and to the extent feasible, honor Albert's request for photocopies of referral records in relevant classifications, on payment of reasonable costs for those photocopies retroactive to the date first requested by Albert.[2]

(b) Post at its facility in Honolulu, Hawaii, copies of the attached notice marked ''Appendix B.''[3] Copies of the notice, on forms provided by the Officer-in-Charge for Subregion 37, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Officer-in-Charge in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] The General Counsel has requested that Respondent be ordered, on a monthly basis, to print out a list of names for all classifications in which person are registered at the hiring hall and to keep and maintain the list for a year. Respondent contends that its hiring hall records are kept on a computer, that they are subject to variable degrees of change on a daily basis, and that a monthly printout to be saved for a year would be unduly expensive, burdensome, and impractical. I agree with Respondent and adopt its arguments as my rationale and decline to recommend such a condition to the standard Board Order.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

[Certain errors in the transcript are noted and corrected.]

91

(Witness excused.)

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. Are you resting on rebuttal?

MS. HAWKEN: Yes, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: Any sur rebuttal?

MR. MILLER: No, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. This brings us to the close of the hearing and I have been asked to issue a bench decision, which I am prepared to do. I have tried to review some of the prior bench decisions to get a flavor or exactly how they operate and I haven't been able to find one that is a CB type decision. Most of them have to do with CA cases where there's one or more alleged discriminatees. But, I'm going to begin my remarks by alluding to the law. And then, I'll move from that into the facts that I find.

In the *International Brotherhood of Boilermakers*' case which is published at 318 NLRB 205, the Board states—

MS. HAWKEN: Excuse me, Your Honor, Court Reporter?

COURT REPORTER: Excuse me. I want to go ahead and switch these over. Okay.

ADMINISTRATIVE LAW JUDGE STEVENSON: The Board states what could be called Hornbook law. A union violates Section 8(b)(1)(A) when it arbitrarily denies a member's request for job referral information when that request is reasonably directed toward ascertaining whether the member has been fairly

92

treated with respect to obtaining job referrals. In a footnote to that decision which is footnote 2, the Board goes on to say that we believe that the right to photocopy is a corollary to the right of access to referral records.

So, that is my starting point in this case. I also note the case of *Iron Workers Local 227*. I'm sorry. *Iron Workers Local 27*, sorry, which is at 313 NLRB 215, ''Union must copy and furnish the referral information to the employee.'' That's at page 218 of the JD. Now, in that case, the union said the reason we didn't give the information out was because we were concerned that the telephone numbers that were on the out of work list would somehow leave the registrants open to unwelcome sales solicitation.

And the Board rejected that contention or that defense and said that the registrant's right outweighs that speculation. Finally, in *Teamsters Local 282 (General Contractors)*, which is published at 280 NLRB 733 at 735, the Board said that the employee is entitled to access to job referral lists to determine his relative position in order to protect his, or I would submit her, referral rights.

Now, in this case, I find that for some reason, in late 1995, Ms. Albert had reason to believe, whether she heard it from another member is really not important because I find that there's no evidence in this case to support any contention that Ms. Albert was acting in bad faith or for political reasons.

93

There just is no information at all to support that contention. So, in late 1995, she began to consider whether she was being fairly treated on the out of work list.

She made a number of visits, thereafter, which, for our purposes here, culminated in one or more visits, during April 1996, to the exclusive hiring hall, all operated by this Respondent. After requesting the out of work lists that pertain to her multiple registrations numbering somewhere between seven and nine, and being refused on one occasion pending an opportunity by the dispatcher to speak with his superiors, and then, she returned and the dispatcher forgot to check with his superiors. Came back again, only to be shown some information.

Now, there's a little uncertainty in my mind exactly what she was shown. But, I don't have to really get into that because she was entitled to be shown the out of work lists for her seven to nine registrations and, whatever she was shown, that was not it. So, whether she was shown that, as the Respondent contends, with the caveat that she could not make any notes or could not take the information out of the office, even if I were to credit that testimony, that would not be sufficient at all and would not comply with Board law.

I also want to say a word about the dispatcher here, who, like all of us, would be concerned with the way he's performing his job. He doesn't want to do anything that would put himself

94

in a bad light, just as I would be concerned and still do even now, I find that there was no evidence he was acting in bad faith. So—but, that finding has nothing to do with the violation that's alleged.

As a matter of fact, I'll continue to note that the dispatcher, John, seemed to go out of his way to suggest to Ms. Albert that her opportunities for a job referral would be enhanced if she were to register for additional classifications which, apparently, she would not have known about had not the dispatcher gone out of his way to assist her. Of course, he didn't, in my opinion, go far enough because he was acting under orders from his superior and he did not allow her to make the copies that I find that she requested to make, and that she would have wanted to take out of the office.

There were some questions by Mr. Miller, properly so because he's a good lawyer. He asked Ms. Albert, what could she have done with the information if she had received it, or could she have accomplished what she said that she wanted to do. And as I consider that, that reference and that line of questioning, first of all, I find that to ask an applicant who was denied that what she was entitled to do, what she could have done with it, asks her to engage in base speculation.

I don't know that— and she responded in a way that I thought was most appropriate. She said I'd have to see the information and then decide if I could have done anything with

95

it. So, I, myself, don't know if she could accomplish what she set forth to do, if she had been given the information. But, that would be for her and not for me to decide. I do not have the competency to reach that.

I also want to note for the record that there may be some cases where it is so obvious that a member is not acting in good faith or is acting for political reasons, or for some other reason that would not be countenanced by the Board, that there might be an exception as to when the out of work list is to be provided. But, I see no evidence in this case that Ms. Albert should be in a possible exception, if there should be exceptions.

And I haven't been able to find any Board cases except for one case where the Board did say that the union did not have to provide the social security numbers and that is published at 317 NLRB, number 158. And I apologize, I do not have the name of that case, but that's the correct citation. However, the Board went on to say that the telephone numbers, and the names, and the rankings on the out of work list should be provided.

So, I find that the General Counsel has established a *prima facie* case, that Section 8(b)(1)(A) of the Act has been violated in this case, and I find further, that the Respondent has not provided sufficient information to rebut the inferences that flow from the *prima facie* case. Therefore, I find that the violation has been established.

96

I will recommend the usual cease and desist order. I will recommend that the notice be posted, as I will prepare a properly worded notice after I receive the transcript. Now, in this case, I now advance to the difficult part of the case, difficult in the actual wording of the order that has been requested by the General Counsel. First of all, I would not exceed to recommend that the union be ordered to print up an out of work list every month and then maintain that list in its files for a year's time.

I don't know if it's appropriate to do this in a bench decision, Mr. Miller, but allowing you every right to appeal on a substantive violation, which you have every right to do anyway, I would invite your recommendation and some alternative—and some alternative way to preserve the theory—to preserve what General Counsel is trying to establish and preserve here without a month—without doing this every month. Would you care to make some alternative recommendation without waiving your right to appeal the substantive violation or you may wish not to?

MR. MILLER: Yes, Your Honor. I would have preferred the opportunity to give a final argument first and to have filed a brief. We were—Local 3 did not want a bench decision and that should be clear from the record because we were not asked whether or not we wanted a bench decision and in our conversation, we told you that we were opposed to a bench

110

like I say, 20, there would have been no problem. I think as a—I guess my concern, again, is the length of the list. If Ms. Albert were to go tomorrow or some other registrant—I guess, there's two issues. One issue is something that's perspective and the case has not really dealt with huge out of work lists.

ADMINISTRATIVE LAW JUDGE STEVENSON: If the order—I'm sorry. I didn't mean to interrupt you, continue sir, sorry.

MR. MILLER: I guess Local 3 ought to be willing to provide anything that's reasonable. The question is what is reasonable and if you're second, providing a list of 140 names, to me, does not seem reasonable. Retroactive, I think we ought to have the obligation to—I'd say just—to investigate any problem that Ms. Albert comes—that seems to me the way to resolve her problems, if any.

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. First of all, after listening to the belated closing arguments due to my own fault, I now reaffirm the decision that I made before. Mr. Miller, some of your arguments seem to be contradictory in my mind, respectfully. First of all, you argue that Hawaii is unique. The list is too long to give out on a reasonable basis, and you say if it were only 15 or 20 names, there would be no problem.

But, your second argument is that Hawaii is unique because of some continuing hotbed and turmoil of political activity.

111

But, if the list were only 15 or 20 names and that was all that was going to be provided, that would still leave those 15 to 20 names subject to manipulation for political ends. It would seem to me.

So, that seems somewhat contradictory. So, in any event, I'm not aware of any cases that would look to the length of the list and/or to the potential political activity as reasons to modify the standard Board Rule which I alluded to before. I tried to carve out the possibility that there may be cases in the future where someone's request is so unreasonable, is so evidently in bad faith that they should not be entitled to the material.

But, I think that all we could do if that were to occur is, as you've done in this case, be in contact with the attorney's investigators for the NLRB and if a charge should be made and if a complaint should be issued, then, you would negotiate with them presenting in a position statement why it's so evidently unreasonable or even before the complaint is issued and, presumably, they would accept that argument and we would never assemble here.

And if they should reject it, then you would have a second line of defense which is a neutral administrative law judge who is not beholden to anyone and who has no interest in who wins or who loses any case. And if you should lose there, then you have the Board and you have the courts, and so forth. So, I

112

just cannot see that the length of the list in this case, particularly in the context of the evidence that's developed, and again, I reaffirm my statement before.

I do not know how Ms. Albert or anyone else would use this list if they were number two or number three, and there were 140 names. I confess, I don't know how they would use it. But, there's so many things that I don't understand that I just can't—I can't base any decision on the fact that she may not be able to use it at all, or she may have greater knowledge and experience than I have an be able to make some use of it for the purposes that she indicated in her testimony.

Now, there is no question that the prospective part of this order will say that the Respondent shall—I shall recommend to the Board that the Respondent be ordered not to refuse to provide the information in the past. I can craft this order in the appropriate language in the future once I get this transcript. I'm not attempting to make any order now that will stand up to Board review, so I will use the appropriate language later.

I will also recommend to the Board that the Respondent be ordered, to the extent that it's capable of doing so, to recreate the out of work lists for the nine classifications in which Ms. Albert was registered as of April in 1996 and be ordered to redo the out of work lists for that period of time. And if that should be impossible, not just difficult, not just

113

take some time and effort; but, if it's impossible to do, then, it cannot be done. I will assume that the Respondent will follow the Board order, if my decision survives review and we would be assured of the good faith of the Respondent. So, I would not be worried about that. That's part of what you—half of what you ordered.

MS. HAWKEN: Yes, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: Of what you recommended. Now, with respect to this question of preserving out of work lists on some kind of regular basis. With respect to your question of asking the Respondent to preserve their out of work records on some kind of periodic basis, as you first put it, you decided that on a monthly basis, do you know of any cases that support that request?

MS. HAWKEN: Your Honor, there is one case. It didn't specifically go—well, actually it did involve out of work lists. *Teamsters Local 293* at Volume 302, page 403, discussed in that case, the union—the dispatcher did not keep a written out of work list. He more or less, I believe, kept some kind of list in his mind, was the facts of the case.

There was no written record. And as part of the remedy in that case, the Board required that—I'm sorry, it was found that there was a violation for failing to use or maintain an out of work list or other formal written records.

And I believe, that the remedy required that the union, in

114

general, maintain, preserve and keep books, and or a semipermanent type of record to reflect accurately, fairly and nondiscriminatorily, the operation of the referral system. I don't believe that the order in that case specifically said that there is a—required the union to maintain and keep copies of an out of work list. But, that was the closest I could find.

ADMINISTRATIVE LAW JUDGE STEVENSON: So, in other words, your position is, in this case, if it was—if the estimate I heard was correct, that there's about say 125 different classifications, then on an average of about 130 to 140

names per classification even though there's a lot of duplicates, then, you would recommend that they be ordered to print out all 126 times 140 names per month and then keep them for a year?

MS. HAWKEN: Yes, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. I am leaning against that, as I think about it. I believe that would be burdensome and unreasonable. There is a principle of law that a person should not sleep on their rights. If they believe they've been wronged, they have to go and immediately—I'm going to give some further thought to it, but I will, as of right now, I will reject a monthly claim.

MS. HAWKEN: If I may, Your Honor. Just one comment in respect to people sleeping on their rights. In this case, Ms. Albert did immediately file a charge with the Board. We're

115

here a year later discussing this and the further and further we get from the date she just requested the list, the more difficult it is for the union to recreate that list. If they're required to keep some type of list on a regular basis, it would be less difficult.

ADMINISTRATIVE LAW JUDGE STEVENSON: If Ms. Albert were to find out that due to the negligence or some other reason of the union that she was passed over when she should have been referred out and she's now been working for 10 months, does she have some remedy under the act that she could—

MS. HAWKEN: I believe that she would, Your Honor. She would be able to file another type of 8(b) charge under the Act. I don't think that it would be barred by 10(b), the six-month statute of limitations because she wasn't able to find out about the violation due to the Respondent Union's actions in preventing her from access to the information that would allow her to know whether or not her rights had been violated.

ADMINISTRATIVE LAW JUDGE STEVENSON: You would agree with me, I assume, that printing out this multiple list on a daily basis would be out of the question, would you not?

MS. HAWKEN: I agree that that would be rather burdensome, Your Honor, yes.

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. And since there are changes from day to day, as you, yourself, have pointed out, if I'm going to craft such a recommended element

116

to the order, the question is just where to draw the line. We agree that daily would be ridiculous. Monthly seems to me you don't agree with that.

MS. HAWKEN: No, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: But, monthly seems to me not appropriate. I will—I think under the rules of bench decisions, I can claim further time as to how to do this, if I do it at all.

MS. HAWKEN: Yes, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: And I may end up with exceptions from both sides which happens all the time, and we'll see what happens. I may—I may buy part of your argument, Mr. Miller, and you may win, in part on this. As you point out, we are living in now a computer age and there needs to be some allowance for that in every way, not just in one direction, but in different ways, so. All right. To recapitulate, I will enter the usual cease and desist order; and in any like or related manner element, I will craft the affirmative action requirement of the order, as I previous stated to have, to the extent the union is capable of doing to recreate the out of work lists for the seven to nine classifications as of April 1996; and provide photocopies to Ms. Albert with no costs. Well, according to this order that I'm reading now from 318 NLRB 205, the Boilermakers' case at page 206, the union is entitled to request payment of

117

reasonable costs for any photocopy. So, I would consider myself bound by that and the requesting party would have to pay a reasonable cost.

MS. HAWKEN: I understand that, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. I will also fashion a notice that would recommend that it be posted in the usual way for the usual amount of time, and then, I will give further consideration to the elements of the order along the lines that we discussed.

MS. HAWKEN: Excuse me. There's one thing that you didn't mention, Your Honor. There is going to be an affirmative obligation to provide in the future, upon an employee's request, a copy of the out of work list.

ADMINISTRATIVE LAW JUDGE STEVENSON: Yes. Well, that's never been any problem. For prospective coverage, that from here on in, if my decision survives any appeal, that may be taken that a requesting member, upon payment of reasonable costs, would be entitled to a full out of work list for any classification that that person is registered in and I don't know of any reason to carve out the District of Hawaii for special treatment that the Board doesn't allow anyone else. Whether you use the terminology they have different Section 7 rights or you just use different terminology, I don't know, but I think we all have to abide by the Board rules unless they carve out an exception to this case and I'll know the next time

118

I come here. Do you have any further recommendations that anything, in your opinion, that I may have overlooked?

MS. HAWKEN: No, Your Honor. I think we've covered everything.

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. Do you want to make any further recommendations?

MR. MILLER: I don't think so, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: All right. Well, thank you all for being here. This is the first time I've done a bench decision. I usually like to get out of town before deciding who wins and who loses. It's always easier doing it that way. But, in this case, I haven't been able to get out of town yet. And hopefully, there's not too great a disappointment, or if there is, then some degree of confidence that the Board will change what I indicated that I intend to do. So anyway, this is my second case here this time around. Thank you all for being here and we'll see you the next time I have the option to come to Hawaii. Thanks again.

MS. HAWKEN: Thank you, Your Honor.

ADMINISTRATIVE LAW JUDGE STEVENSON: Have a good day.

(Whereupon, the hearing concluded at 12:15 p.m.)

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT arbitrarily deny requests for photocopies of referral records from employees who are registered in various classifications for referral from our exclusive hiring hall and who reasonably believe they have been improperly denied referrals.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL honor Cynthia Albert's request for photocopies of referral records on payment of reasonable costs for those photocopies or, alternatively, allow her to photocopy those records.

WE WILL, to the extent feasible, honor Albert's request for photocopies of referral records in relevant classifications, on payment of reasonable costs, retroactive to the date first requested by Albert.

OPERATING ENGINEERS LOCAL UNION NO. 3
OF THE INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL–CIO